Federal Defenders
OF NEW YORK, INC.

Eastern District
16 Court Street - 3rd Floor, Brooklyn, NY 11241
Tel: (718) 330-1200 Fax: (718) 855-0760

Leonard F. Joy
Executive Director

Eastern District
Peter Kirchheimer
Attorney-in-Charge

By ECF and Hand

The Honorable Robert M. Levy
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

December 20, 2006

Re: In the Matter of the Extradition of Doron Merom, 06-M-1151 (RML)

Dear Magistrate Judge Levy:

The government of Israel seeks to extradite Doron Merom for alleged offenses ending in the year 2000. The United States' extradition treaty with Israel provides in Article VI that extradition shall not be granted if the prosecution would be barred by the lapse of time according to the laws of either the requested or requesting party. As federal law provides for a five-year statute of limitations, 18 U.S.C. § 3282, extradition should be denied.

The government incorrectly argues in its December 15, 2006, letter that the New York state, rather than federal, statute of limitations controls this issue because the offense Merom is accused of committing would be a state-law offense in the United States. As detailed in Theron v. U.S. Marshal, 832 F.2d 492 (9th Cir. 1987),[1] this argument confuses the issue of dual criminality, which may be governed by state law, with the distinct question of whether the limitations period has expired according to the laws of either of the parties to the treaty. See Murphy v. United States, 199 F.3d 599 (2d Cir. 1999) (citing Theron for proposition that question of dual criminality is wholly distinct from limitations period issues). Construing a provision similar to that here, the Court in Theron held the federal five-year statute of limitations controlled a defendant's extradition proceeding and not California's three-year period because the United States, not California, was the contracting party to the treaty. The Court further noted that every circuit to address the issue has applied the federal limitations period. Theron, 832 F.2d at 498 (citing United States v. Kraiselburd, 786 F.2d 1395, 1397 (9th Cir.1986); In re Assarsson, 670 F.2d 722, 725 (7th Cir.1982); Jhirad v. Ferrandina, 536 F.2d 478, 480 (2d Cir.1976). Although Jhirad and Assarson contain no explicit analysis, the Second Circuit and Seventh Circuit appear to have simply relied on treaty language nearly identical to that here in finding federal law applies. Indeed, it appears that the government has rarely even disputed this question. See Matter of Requested Extradition of McMullen, 1988 WL 70296 at * 2 (S.D.N.Y.).

---

[1] Theron was abrogated on totally unrelated grounds in United States v. Wells, 519 U.S. 482 (1997).

The government further argues that even if federal law applies, the statute of limitations should be deemed tolled because it would be tolled under Israeli law by the arrest warrant. The case cited for this proposition, Cherry v. Reish, 1996 WL 509735 (S.D.N.Y), simply asserts this purported rule, and cites a Ninth Circuit case that does not stand for it. As a simple matter of treaty construction, Cherry appears to be wrong. The treaty provides that extradition will be denied if the prosecution would be barred by the lapse of time under the laws of either party, not some ill-defined combination of each country's law.

Although some courts have used the date of a foreign arrest warrant to measure the expiration of the statute of limitations under our law, see Caplan v. Vokes, 649 F.2d 1336 (9th Cir. 1981), it appears these courts have primarily done so where the requesting country's warrant is the "functional equivalent of an indictment." Matter of Extradition of Betrand,1986 WL 8845 at *5 (D.N.J 1986) (quoting Jhirad v. Ferrandina, 536 F.2d at 480). Even this would appear to be a debatable proposition. See Matter of Assarsson, 687 F.2d at 1161 n. 8. In Bertrand, the District Court considered the fact that the Swiss warrant was issued by an examining magistrate, and emphasized that the warrant was the "final step" in the criminal investigation needed to bring a defendant to trial. The government here makes no claim that the Israeli arrest warrant, a translation of which is attached to the extradition request as Exhibit E-1, is the functional equivalent of an indictment or information; indeed the extradition request alludes to an indictment which has been prepared but not filed. Thus, even if some foreign arrest warrants are comparable to indictments and thereby represent the formal bringing of charges within the limitations period, the instant Israeli warrant does not meet this test.

Thus, as stated at the status conference, if the government cannot demonstrate at an evidentiary hearing that the defendant fled from justice and thereby tolled the statute of limitations under 18 U.S.C. § 3290, extradition should be denied.

Very Truly Yours,

Michael Weil, Esq.
(718) 407-7413

cc: AUSA Elizabeth Geddes
Doron Merom